

## H. Exclusion of Non-Network Affiliated Broadcasters from the Benefits of Local-Into-Local Carriage

307. *Positions of the Parties* Johnson Broadcasting contends that DirecTV has denied it local-into-local carriage, as a licensee of TV station KLDT, Lake Dallas, Texas, in violation of the SHVIA.<sup>842</sup> Since SHVIA's implementation, Johnson Broadcasting claims DirecTV has attempted to undermine the Act's policy objectives by excluding non-network affiliated broadcasters from the benefits of local-into-local carriage.<sup>843</sup> Johnson Broadcasting states that DirecTV alleged that Johnson Broadcasting filed its request for carriage one day late and therefore denied Johnson's request. Johnson Broadcasting argues that the deadline fell on a Sunday and therefore filed the next day, Monday, in accordance with Commission filing rules. As a result, Johnson Broadcasting filed a complaint with the Commission's Cable Services Bureau, which was subsequently denied.<sup>844</sup> Johnson Broadcasting now has an Application for Review regarding its complaint pending before the Commission. Johnson Broadcasting contends that it will not be eligible for carriage on DirecTV's system until January 1, 2006, as a result of DirecTV's denial of local-into-local carriage.<sup>845</sup> Johnson Broadcasting seeks the imposition of several conditions. First, before acting on the proposed transaction, the Commission should first ensure that all broadcasters be guaranteed the right to mandatory carriage in any market where DirecTV provides local-into-local service. Second, the Commission should grant Johnson Broadcasting's Application for Review and order DirecTV to commence carriage of KLDT in the Dallas DMA.<sup>846</sup>

308. The Applicants argue that this license transfer proceeding is not the proper forum to litigate Johnson Broadcasting's complaint and note that the Media Bureau and a federal district court have already dismissed this same mandatory carriage complaint against DirecTV.<sup>847</sup>

309. *Discussion.* We agree that this license transfer review proceeding is not the proper forum to address Johnson's Broadcasting's complaint, and Johnson Broadcasting has provided no evidence indicating that DirecTV is in violation of SHVIA on an industry-wide basis. Accordingly, we reject the conditions proposed by Johnson Broadcasting.

## I. Lack of Final Media Ownership Rules

310. *Positions of the Parties.* The National Hispanic Media Coalition (NHMC) argues that the Commission should deny the proposed transaction application and find that a substantial and material question exists as to whether the proposed transaction is in the public interest because the Commission

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<sup>842</sup> Johnson Broadcasting Comments at 1.

<sup>843</sup> *Id.* at 2

<sup>844</sup> See *Johnson Broadcasting, Inc. v. DirecTV, Inc.*, 16 FCC Rcd 21329 (2001); *Johnson Broadcasting of Dallas, Inc. v. DirecTV, Inc.*, 17 FCC Rcd 886 (2002)

<sup>845</sup> Johnson Broadcasting Comments at 2

<sup>846</sup> *Id.* at 3.

<sup>847</sup> Applicants' Reply at 73 (citing *Johnson Broadcasting, Inc. v. DirecTV, Inc.*, 16 FCC Rcd 21329 (2001); *Johnson Broadcasting of Dallas, Inc. v. DirecTV, Inc.*, 17 FCC Rcd 886 (2002); *Johnson Broadcasting, Inc. and Johnson Broadcasting of Dallas, Inc. v. DirecTV, Inc.*, Civil Action No. H-02-0136, Opinion (S.D. Tex., Houston Div.) (Jul. 15, 2002) (granting motion to dismiss of DirecTV).

## J. Protection of General Motors Class GMH Stockholders

313. *Positions of the Parties.* Wyser-Pratte Management Co. (Wyser-Pratte) petitioned the Commission to deny the proposed transaction or condition its approval of the proposed transaction on the equitable treatment of holders of General Motors Class H Common Stock ("GMH stock")<sup>857</sup> so that GMH stockholders are treated as favorably in the proposed transaction as GM, the holder of all of Hughes common stock.<sup>858</sup> Wyser-Pratte alleges that the proposed transaction discriminates against GMH stockholders through a \$275 million distribution from Hughes to GM as a part of the transaction for claimed "value enhancements" for GMH stockholders arising from the conversion of GMH from a tracking stock to an asset-based stock.<sup>859</sup> Wyser-Pratte claims the proposed transaction will result in proceeds of sale of Hughes to News Corp. at \$15 per share to GM and \$14 per share to GMH shareholders.<sup>860</sup> Wyser-Pratte argues based on Commission precedent that the Commission is obligated to protect the rights of GMH shareholders in the Commission's review of the proposed transaction.<sup>861</sup>

314. *Discussion.* We disagree with Wyser-Pratte that its claim falls within the scope of our review of the proposed transaction. While it is true that the Commission does consider the rights and interests of the relevant companies (shareholders) and consumers (ratepayers) in its review of license transfers, we agree with the Applicants that it is beyond the scope of our review to consider allegations of unfair premiums paid to specific classes of shareholders in a given transaction.<sup>862</sup> The Commission is not the proper forum for what is, in effect, a shareholder derivative suit seeking a share of an alleged control premium. Such claims are properly within the jurisdiction of the appropriate state court.<sup>863</sup> Accordingly, we dismiss Wyser-Pratte's petition as beyond the scope of our review of the proposed transaction.

## VIII. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

315. We now consider the efficiencies and other public interest benefits that Applicants claim will result from the proposed merger. As discussed below, we find that the proposed transaction is likely to yield several cognizable benefits. First, we find that News Corp., in its management of BSkyB, Sky Italia, and its other DTH operations, has demonstrated a willingness to take risks in introducing and promoting new and innovative services. Based on this management history, and in particular, its record of innovation in many media businesses, including its introduction of interactive services in the United Kingdom, we find credible the Applicants' claim that News Corp. will accelerate the introduction of new services, and, in particular, interactive television services by DirecTV, and that the public will benefit from the entry of this innovative and aggressive competitor in the MVPD market. Second, we conclude

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<sup>857</sup> GMH is a tracking stock of GM designed to provide its holders with financial returns based on the financial performance of Hughes, a wholly owned subsidiary of GM. See Wyser-Pratte Management Co. Petition at 7.

<sup>858</sup> Wyser-Pratte Management Co. Petition at 1

<sup>859</sup> Wyser-Pratte Management Co. Petition at 11.

<sup>860</sup> Wyser-Pratte Management Co. Petition at 2-3

<sup>861</sup> *Id.* at 15 (citing *Illinois Public Telecommunications Assoc v FCC*, 117 F.3d 555, 569 (D.C. Cir. 1997)).

<sup>862</sup> See Applicants' Aug. 28 *Ex Parte*.

<sup>863</sup> See *id.* (citing *A L Z. Broadcasting, Inc.*, 15 FCC Rcd 23200, 23201 (2000); *Loral Corp.*, 12 FCC Rcd 24325, 24322 (1997)).

benefits must be calculated net of the cost of achieving them."<sup>868</sup> Furthermore, speculative benefits that cannot be verified will be discounted or dismissed. Thus, as the Commission explained in the *EchoStar-DirecTV HDO*, "benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present."<sup>869</sup> Third, the Commission has stated that it "will more likely find marginal cost reductions to be cognizable than reductions in fixed cost."<sup>870</sup> The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.<sup>871</sup>

318. Finally, the Commission applies a "sliding scale approach" to evaluating benefit claims. Under this sliding scale approach, where potential harms appear "both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand."<sup>872</sup>

## B. Claimed Benefits

319. The Applicants claim that the proposed transaction will generate several types of public interest benefits. These claimed benefits are summarized and evaluated below.

### 1. Improvements in DirecTV's Service Offerings Resulting from News Corp's Innovative Management

320. Claiming that News Corp. "has a proven track record of innovation in programming and DTH services," Applicants contend that News Corp. will apply its innovative management style to Hughes.<sup>873</sup> In particular, the Applicants claim that News Corp. will enhance DirecTV's interactive television offerings and increase the penetration of integrated set-top boxes among DirecTV customers.

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by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), [and] how each would enhance the merged firm's ability to compete. . .").

<sup>868</sup> *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 190.

<sup>869</sup> *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 190.

<sup>870</sup> See *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 191; see also *DOJ/FTC Guidelines* § 4.

<sup>871</sup> See *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 191; see also *DOJ/FTC Guidelines* § 4.

<sup>872</sup> *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 192 (citing *SBC-Ameritech Order*, 14 FCC Rcd at 14825). Cf. *DOJ/FTC Guidelines* § 4 ("The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.").

<sup>873</sup> As examples of innovations News Corp introduced into DTH services, the Applicants cite: (1) BSkyB's conversion to digital technology in 1998 and its decision to provide free set-top-boxes and dishes in 1999; (2) BSkyB's introduction of an interactive news service in 2000, which offered multiple segments broadcast simultaneously; (3) BSkyB's subsequent introduction of additional interactive services, such as "shopping, banking, games, e-mail, travel, tourism and information services;" and (4) BSkyB's introduction of "Europe's first fully integrated DVR." As examples of News Corp's innovations in programming, the Applicants, among other things, (continued....)

and other affiliated companies . . . [will] create consumer awareness of and demand for the product.”<sup>881</sup> Applicants state that they plan to deploy set-top-boxes with integrated DVRs at more competitive prices by 2005.<sup>882</sup> In addition, they claim that they are “exploring the potential of incorporating digital terrestrial television tuners into DirecTV set-top boxes.”<sup>883</sup> They further claim that “these digital signals can be seamlessly processed by the set-top-box with the DirecTV satellite signal in a manner that will be transparent to the viewer.”<sup>884</sup> Applicants also contend that the “proposed transaction should result in a significant reduction in signal piracy” because of the post-transaction combination of efforts by DirecTV (which currently uses its own proprietary conditional access technology) and News Corp.’s subsidiary, NDS, a leading provider of conditional access technology.<sup>885</sup>

325. *Discussion.* We find that News Corp., under the leadership of Rupert Murdoch, has demonstrated a willingness to take risks, introduce innovative services, and fundamentally change the nature of competition in multiple media markets. And in numerous cases, this willingness to take risks has benefited both News Corp. and consumers. For example, in its management of BSkyB, Sky Italia, and its other DTH operations, News Corp has demonstrated a willingness to take risks in introducing and promoting new services, including, in particular, interactive services and new programming channels. We further find that these innovations have generated increased subscriber growth and reduced churn, indicating increased consumer satisfaction. For example, in October 1998 BSkyB introduced digital satellite service and aggressively promoted it by giving away set-top boxes and introducing a new low-cost entry-level digital tier.<sup>886</sup> Between its introduction of digital DTH service in October 1998 and June 2002, News Corp. increased the total number of subscribers to BSkyB from 3,547,000 to 6,101,000 (an increase of 72%), while reducing churn significantly.<sup>887</sup> Moreover, the majority of this increase followed the introduction of digital interactive services.<sup>888</sup> In fact, in the first six months after the introduction of

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<sup>881</sup> Application at 23.

<sup>882</sup> Applicants’ Sept. 22 Ex Parte at 5.

<sup>883</sup> Application at 29-30. The Applicants contend that, “[b]y mounting a small antenna for receiving broadcast signals at the same point where the satellite dish is located, most subscribers would be able to receive digital television broadcast signals from their local stations over-the-air.” *Id.*

<sup>884</sup> *Id.* at 30.

<sup>885</sup> Application at 37. NDS is also “a leading supplier of open end-to-end digital systems and solutions for the secure delivery of entertainment and information to televisions and IP devices. NDS enables broadcasters, network operators and content providers to profit from the deployment of digital TV technologies including innovative interactive applications and personal TV, secure broadband and datacasting solutions.” See NDS, About NDS, at [http://www.nds.com/about\\_nds/about\\_nds.html](http://www.nds.com/about_nds/about_nds.html) (visited Sept. 11, 2003).

<sup>886</sup> See, e.g., Dan Milmo, *BSkyB Does Digital Dash to 7 m Subscribers Mark*, THE GUARDIAN (Sep. 29, 2003) (“Sky Digital’s growth was backed by a high-risk strategy . . . of giving away set-top boxes to customers for free.”); Paul Davies, *BSkyB Makes Bid for Mass-Market with £ 6 99 Entry-Level Digital Tier*, NEW MEDIA MARKETS 1 (Aug. 13, 1998)(BSkyB offers cheaper than expected entry-level digital tier).

<sup>887</sup> Letter from Gary M. Epstein, Counsel for General Motors Corp. and Hughes Electronics Corp., *et al.* to Marlene H. Dortch (Sept. 10, 2003) (“Applicants’ Sept. 10 Ex Parte”) at Attachment 2. See also Applicants’ Sept. 22 Ex Parte at 8.

<sup>888</sup> Applicants’ Sept. 10 Ex Parte, Attachment 2

are already stepping up plans to introduce new interactive services.<sup>898</sup> In this regard, we find that News Corp.'s recent acquisition of *MEDIAHIGHWAY* from Thomson for \$66.5 million indicates a commitment on the part of News Corp. to interactive television.<sup>899</sup> Although we can not estimate exactly the value to consumers of News Corp.'s innovative management style, we find it to be a major benefit to the public of the transaction.<sup>900</sup>

328. On the other hand, we find that the Applicants have not demonstrated that their claims concerning increased penetration of integrated set-top-boxes are either credible or transaction-specific. More specifically, we find that the Applicants make broad claims about set-top boxes without providing adequate supporting evidence. In addition, with respect to the claim that they might integrate digital terrestrial television tuners into DirecTV set-top boxes, they do not explain why this integration could not take place in the absence of the transaction.

## 2. Increased Offering of Local-into-Local, HDTV, and Broadband Services

329. Applicants claim that, after the merger, News Corp.: (1) will bring its commitment to local-into-local to DirecTV and thus increase the number of DMAs in which local broadcast signals are available; (2) will increase the amount of HDTV programming that DirecTV makes available; and (3) will develop new options for consumer broadband services.<sup>901</sup> Applicants state that they will consider using new satellites and new technologies to achieve that goal, and they specifically point to the possibility of using Ka-band satellite capacity and/or integrating digital terrestrial tuners into the DirecTV set-top boxes. Applicants further assert that News Corp. will work aggressively to expand broadband options to better compete with cable's video and broadband offerings.

330. NRTC and ACA respond that Applicants have not explained how the merged firm will expand local-into-local service and have not made a commitment as to how many markets it will serve. NRTC asserts that, while Applicants claim that they will increase both local-into-local and HDTV, they do not explain how they will accomplish both at the same time.<sup>902</sup> NRTC asserts that the same is true with respect to broadband services -- that the Applicants have failed to discuss how or when DirecTV's satellite broadband offerings will be expanded.<sup>903</sup> ACA asserts that News Corp. could increase the availability of HDTV nationwide by broadcasting HD on Fox Network.<sup>904</sup> JCC claim that Applicants admit that Hughes can expand DirecTV's local-into-local offerings absent the transaction.<sup>905</sup> EchoStar

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<sup>898</sup> See *MULTICHANNEL NEWS*, December 1, 2003.

<sup>899</sup> *Id.* at 5; see also Applicants' Sept. 22, 2003 Ex Parte at 5.

<sup>900</sup> Certain parties, including CDD, contend that the transaction will give News Corp. a "stranglehold" over ITV technologies and products, including conditional access technologies. These comments are addressed in section VI.C.4.d.ii, *supra*.

<sup>901</sup> Application at 27.

<sup>902</sup> NRTC Petition at 17-18, ACA Comments at 25-26.

<sup>903</sup> NRTC Petition at 19. NRTC urges that we require Applicants to make specific commitments to deploy broadband services to rural America. *Id.* at 19-20.

<sup>904</sup> ACA Comments at 26-27.

<sup>905</sup> JCC Comments at 68.

increasing the number of DMAs in which DirecTV subscribers can receive local broadcast television stations furthers the Commission's goal of promoting localism.<sup>911</sup>

334. Applicants have alleged that a benefit of the transaction will be the provision by the end of 2004, by DirecTV of either local channels in an additional 30 DMAs or 30 more channels of HDTV, or a combination of local channels and HDTV channels that have similar bandwidth requirements above and beyond what had been previously funded, projected or planned by Hughes/DirecTV.<sup>912</sup> In order to ensure that Applicants live up to their commitment to achieve the important public interest benefit of increased local channel service to all regions of the country, we require, as a condition of our license transfer approval, that, by year end 2004, Applicants provide local channel service in an additional 30 DMAs beyond what had been previously funded, projected or planned by Hughes/DirecTV. In the event that circumstances beyond DirecTV's control limit its ability to fulfill this license condition, DirecTV may petition the Commission for waiver pursuant to Commission rules.<sup>913</sup>

### 3. Increased Operating Efficiencies

335. Applicants claim that, as a result of the transaction, DirecTV will realize savings in annual overhead and other operating expenses in the range of \$65 million to \$135 million. These savings, according to the Applicants, will be due largely to News Corp.'s experience in direct to home satellite services and its commitment to cost-efficient operations. The major elements of these claimed savings are: (1) savings of \$40-80 million from reduced customer service costs, of which \$20-40 million is assumed to be merger-specific; (2) savings of \$40-80 million from reduced general and administrative expenses; and (3) savings of \$7-15 million from drawing on News Corp.'s experience and rationalizing operational areas of overlap.<sup>914</sup>

336. ACA responds that, to the extent that the Applicants might realize any efficiencies, they will provide the merged firm with resources to support anticompetitive conduct.<sup>915</sup> EchoStar and JCC state that the claimed efficiencies are unsupported by the evidence, are not transaction-specific and verifiable, and that the benefits of those efficiencies would flow to News Corp. rather than to consumers.<sup>916</sup>

337. *Discussion.* Excluding for the moment savings that result from integration of the current distribution facilities of News Corp. and DirecTV, Applicants have not provided sufficient supporting evidence for us to verify and quantify the claimed savings resulting from increased operating efficiency. More importantly, Applicants have not demonstrated that the claimed savings in operating costs are transaction specific. In this regard, we note that many of the claimed savings are related to the introduction of "best practices," but Applicants fail to demonstrate why DirecTV, by itself or through other means that pose fewer competitive risks than the merger, could not also introduce those same best

<sup>911</sup> See, e.g., 2002 Biennial Review Order, 18 FCC Rcd at 13643-45 ¶¶ 73-79

<sup>912</sup> Applicants' Sept. 22 Ex Parte at 2.

<sup>913</sup> See 47 C.F.R. § 1.925.

<sup>914</sup> Application at 31-33, Giacalone Decl ¶¶ 9-14.

<sup>915</sup> ACA Comments at 26

<sup>916</sup> EchoStar Petition at 43-44; JCC Comments at 69-70.

Applicants claim that the vertical integration that will result from the transaction will reduce the risks of developing and launching new programming.<sup>922</sup>

340. In addition, Applicants contend that the proposed transaction can achieve “significant economies of scope and scale” in the area of set-top boxes.<sup>923</sup> According to Applicants, DirecTV’s set-top boxes, which use a DirecTV proprietary standard, can be incorporated into the set-top-box platform used by News Corp. satellite affiliates.<sup>924</sup> They argue that, by specifying the design of its set-top-boxes in greater detail than DirecTV has in the past, set-top-box manufacturers will be able to minimize their development costs and maximize component purchasing power, resulting in lower costs to DirecTV.<sup>925</sup> Applicants further argue that research and development costs can be reduced by pursuing common technology standards across DirecTV and its other satellite affiliates.<sup>926</sup> According to Applicants, these cost savings will amount to about \$10 per set-top box (or approximately \$60 million annually).<sup>927</sup> The Applicants claim that these cost savings will not only benefit the customer purchasing a new set-top-box, but also reduce the subsidies required by the operators.<sup>928</sup> Applicants contend that “this will all be possible without swapping out set top boxes.”<sup>929</sup>

341. JCC counter that, in concluding that set-top-box costs will decrease by \$10 per box, Applicants have, erroneously, assumed that News Corp. manufactures its own set-top-boxes. JCC maintain that the third party set-top-box vendors already compete to provide the best technology at the lowest price, and that the proposed transaction will only decrease the number of buyers in that market.<sup>930</sup> EchoStar claims that any savings would flow to News Corp.’s shareholders, and not to consumers.<sup>931</sup>

342. *Discussion.* To the extent that the proposed transaction enables the parties to combine their R&D efforts and to spread the cost of those R&D efforts over multiple satellite operations, this may increase the merged entity’s incentive to innovate, which could result in new products and services that would not have been introduced absent the proposed transaction. To the extent this occurs, such benefits should be taken into account. On the other hand, if the innovations were developed by a third party who could sell its innovation to DBS or DTH providers worldwide (or if, absent the transaction, News Corp. and DirecTV would sell their innovations generally), then, as JCC point out, it is not clear that the proposed transaction would increase the incentive to innovate.

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<sup>922</sup> *Id.* at 35.

<sup>923</sup> The Applicants’ claims concerning economies of scale in set-top boxes are discussed in greater detail in section VI.C.3.d *infra*.

<sup>924</sup> Application at 33-35, News Corp. July 28 Response at 39

<sup>925</sup> *Id.*

<sup>926</sup> *Id.*

<sup>927</sup> *Id.*, at 35; Giacalone Decl ¶ 22.

<sup>928</sup> News Corp. July 28 Response at 39.

<sup>929</sup> *Id.* at 39 n.30.

<sup>930</sup> JCC Comments at 70-71

<sup>931</sup> EchoStar Comment at 45

347. *Discussion.* As various opponents of the transaction suggest, this claimed benefit, to a large extent, duplicates portions of previous claims, including claims that the proposed transaction will allow News Corp. to: (1) introduce more innovative services; (2) provide more local-into-local and HDTV; and (3) take advantage of economies of scale and scope. To the extent that this claimed benefit is duplicative of other claimed benefits, the benefits should not be counted twice. On the other hand, to the extent that the earlier benefits are cognizable, it is appropriate, in evaluating the earlier claims, to consider not only the cost savings, but also the demand response to any resulting decrease in price.

348. To the extent that the earlier benefits would reduce churn, that reduction would be a cognizable component of those benefits, provided that the earlier benefits are found to be transaction-specific. Applicants have not attempted to quantify these potential consumer benefits, however, but have only estimated the potential revenue gain to the merged entity of between \$450 million and \$525 million by 2006. When we balance potential harms and benefits of the transaction, however, we will not give significant weight to the Applicants' estimate because it is not clear whether some benefits are counted twice and because there is no attempt to quantify the benefits that might flow through to consumers.

## 6. Improved Capital Structure

349. *Positions of the Parties* Applicants claim that, because Hughes is a wholly owned and controlled subsidiary of GM and currently has only a tracking stock, it is limited in its ability to pursue outside financing. The proposed transaction, Applicants claim, will eliminate this problem. ACA responds that DirecTV, while under the control of General Motors, attracted substantial investment, including a \$1.5 billion investment from AOL. ACA further argues that GM's decision on how much to invest in Hughes should have no bearing on the public interest.<sup>937</sup>

350. *Discussion.* Although the proposed transaction may improve Hughes' access to capital, as Applicants contend, we do not believe this to be a transaction-specific benefit. Rather, the gist of Applicants' argument is that DirecTV cannot obtain direct access to the capital markets (because it only has a tracking stock) and that General Motors has no significant interest in further significant investments in this business. To the extent that access to capital is a problem, however, it could be ameliorated through other means that pose fewer competitive risks than the proposed transaction, such as spinning off DirecTV so that it has its own traded stock. Thus, since the capital structure could be improved through other means that pose fewer competitive risks, this claimed benefit is not transaction-specific.

## 7. Reduction in Double Marginalization

351. Applicants claim that the reduction in "double marginalization" which results from vertical integration "will create a downward incentive for News Corp.'s programming prices."<sup>938</sup> As discussed in greater detail above, we agree that vertical integration can reduce prices by reducing double marginalization.<sup>939</sup> Nevertheless, because Applicants have neither attempted to quantify this benefit nor provided sufficient information for the Commission to quantify the benefit, we will not take it into account when weighing the potential harms and benefits of the proposed transaction.

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<sup>937</sup> ACA Comments at 27-28

<sup>938</sup> Applicants' Sept. 22, 2003 Ex Parte at 12. See also Applicants' Reply, Lexecon Report at 6; Applicants' Reply, CRA Analysis at 10-12 & Appendix B

<sup>939</sup> See Section VI C.4.b.iii, *supra*

of the proposed transaction.<sup>948</sup> Applicants cite several News Corp. EEO initiatives, including its Diversity Development Department, which is focused on ensuring a diverse workforce as well as diversity in procurement.<sup>949</sup> Applicants report that News Corp.'s efforts have resulted in increased opportunities for writers, directors, producers and actors from diverse backgrounds.<sup>950</sup> Applicants also cite News Corp.'s internship and apprenticeship programs,<sup>951</sup> a Fox mentoring program for minority film and television entrepreneurs,<sup>952</sup> and the fact that the Fox group of companies now has a much more diverse group of suppliers.<sup>953</sup> Applicants assert that, after consummating the transaction, it will: (1) launch a mentoring program for female and minority entrepreneurs who seek to launch niche cable channels; (2) recruit and/or seek to promote women and minorities into leadership positions at Hughes; (3) implement an internship program at Hughes designed to attract diverse candidates; (4) evaluate and/or modify Hughes' procurement programs to ensure that they provide opportunities for minorities; and (5) upgrade Hughes' internal and external communications to facilitate diversity initiatives.<sup>954</sup>

356. As with Applicants' program diversity claims, commenters contend that these claimed benefits are not transaction-specific. More specifically, they argue Applicants have not shown that DirecTV is any less committed to diversity than is News Corp.<sup>955</sup>

357. *Discussion.* We agree with commenters that Applicants have failed to demonstrate that either the claimed program diversity or employment diversity benefits are transaction-specific. Applicants have described several News Corp. initiatives, which are much like those we seek to promote through our EEO rules.<sup>956</sup> They have also identified a significant amount of News Corp. programming developed by production staff from diverse backgrounds which is targeted to diverse viewing audiences. In addition, News Corp. contends that it has taken steps to create a more diverse base of suppliers of equipment and services. These data may very well evidence high levels of program diversity and successful EEO policies at News Corp. However, Applicants have not demonstrated that DirecTV would not adopt similarly effective EEO initiatives or provide similarly diverse programming absent the transaction. As several commenters note, there is no evidence in the record that DirecTV's current

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<sup>948</sup> Application at 39.

<sup>949</sup> Application at 40.

<sup>950</sup> Application at 40-41.

<sup>951</sup> *Id.* at 41; Applicants' Sept. 11 Ex Parte at 4-7.

<sup>952</sup> Application at 42.

<sup>953</sup> Application at 42; Applicants' Sept. 11 Ex Parte at 7-9.

<sup>954</sup> Application at 42-43.

<sup>955</sup> ACA Comments at 28; JCC Comments at 72.

<sup>956</sup> We note also the presentation at the inaugural meeting on September 29, 2003, of the Advisory Committee on Diversity for Communications in the Digital Age of Mitsy Wilson, Senior Vice President, Fox Entertainment Group, News Corp. Ms. Wilson described diversity initiatives at Fox. The Federal Advisory Committee on Diversity was established by Chairman Powell in May 2003 to bring together experts from the communications, financial, and technology communities to develop recommendations to identify potential regulatory actions and education initiatives that can promote and enhance opportunities for minorities and women.

have anticompetitive effects and is more likely to promote efficiency.<sup>963</sup>

361. There are, of course, obvious differences among broadcast television, cable, and direct broadcast satellite distribution systems. Full-CONUS direct broadcast satellite distribution systems, such as DirecTV's, are both multichannel and nationwide in scope, and this transaction will result in an unprecedented level of integration of both broadcast and cable programming assets with an incumbent nationwide DBS provider. At the same time, while the two primary incumbent DBS competitors have attracted enough subscribers nationwide to rank them among the largest MVPDs, they rank far behind cable operators in most local markets, including all the most populous urban areas.<sup>964</sup> Cable remains the predominant provider of MVPD services in these markets.

362. We must choose the action on the pending application that will serve the public interest with due attention to the context and structure of the current marketplace. Our primary objective is to promote the interest of the consumer of video programming—to maximize the variety, quality and innovation of available programming and minimize its price where possible. The mechanism of choice to achieve this goal is generally to encourage a competitive marketplace.

363. The proposed transaction will shift control of one of the two incumbent full-CONUS DBS providers from a non-media owner who has made no secret of its desire to exit the business in recent years to a media company that has a proven record of innovation and success in providing satellite television services (and, incidentally, competing with cable distribution systems) in other markets throughout the world. As indicated above, we find that the potential improvement in DirecTV's service offerings under News Corp.'s innovative and aggressively competitive management, while inherently difficult to quantify precisely, would be a major public interest benefit. Another tangible benefit that we can ensure will be realized is News Corp.'s commitment to achieve the important public interest benefit of increased local channel service offerings to all regions of the country.

364. Based on our review of the record, we have found that where Applicants lack market power, such as in the programming-related technologies and fixed satellite services markets, no potential public interest harms will arise.<sup>965</sup> At the same time, we also have found that the proposed transaction would create the potential for competitive and other public interest harms in areas in which the Applicants have market power and the transaction would increase their incentive and ability to exercise that market power to the detriment of the public. We reiterate that because local MVPD markets already are highly concentrated,<sup>966</sup> changes in vertical relationships between a major input and output supplier in such a market can have significant competitive effects.

365. Applicants themselves have suggested conditions, analogous to those applicable to vertically integrated cable companies, to mitigate potential harms. We accept these proposed conditions as sufficient, together with our existing program access rules, to protect against any potential competitive harms with respect to ensuring non-discriminatory access to the DirecTV platform for unaffiliated

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<sup>963</sup> See para. 155, note 458, and para. 353, *supra*.

<sup>964</sup> See 2002 Video Competition Report, 17 FCC Rcd at 26903 ¶¶ 4-7, 26929-31 ¶ 58-60.

<sup>965</sup> See Sections VI.C.4.d (Electronic Programming Guides and Interactive Television Markets) and VI.C.4.e (Fixed Satellite Services), *supra*.

<sup>966</sup> *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20616 ¶ 139

direct News Corp. to submit carriage disputes over RSNs and local broadcast stations, at an MVPD's request, to commercial arbitration. Our commercial arbitration remedy is intended to provide a neutral backstop mechanism for the MVPD if commercial negotiations fail to produce a carriage agreement that is mutually satisfactory to News Corp. and the MVPD. Under our condition, an MVPD purchasing News Corp. RSN programming or negotiating a retransmission consent agreement may elect to send its dispute to commercial arbitration with a right of appeal to the Commission. In connection with the election of arbitration, we limit the power of News Corp. to withdraw its broadcast and RSN networks pending resolution of the carriage dispute by the arbitrator. In addition, cable operators with fewer than 5000 subscribers, for whom arbitration would be unreasonably expensive, are given special relief with respect to retransmission consent, and those with fewer than 400,000 subscribers are permitted to bargain collectively and collectively avail themselves of the arbitration remedy for both RSN and broadcast programming.

369 In assessing the potential harms and benefits of the proposed transaction, we note that the major benefit—improved service offerings under News Corp.'s innovative and aggressive management—while adequately supported under the rather unique circumstances of this case, is inherently difficult to quantify. Other claimed benefits, such as merger-related efficiencies, that are not so difficult to quantify have not been adequately supported by Applicants on the record here. Finally, consistent with our commitment to localism and as a tangible confirmation of the benefits of the proposed transaction, we adopt, as a condition of our approval, the requirement that, by year end 2004, DirecTV will offer local channel service in an additional 30 DMAs.

370 With these conditions to mitigate the potential harms and confirm the potential benefits, a fair and balanced assessment of the proposed transaction demonstrates that News Corp.'s acquisition of a controlling interest in Hughes will, as required by the Communications Act, serve "the public interest, convenience, and necessity."<sup>967</sup>

## X. CONCLUSION

371 We conclude that the positive public interest benefits promised by this transaction are sufficient to support the Commission's approval of GM's, Hughes', and News Corp.'s Application, under the public interest balancing test of section 310(d) of the Communications Act, subject to the conditions specified in this Order.

## XI. ORDERING CLAUSES

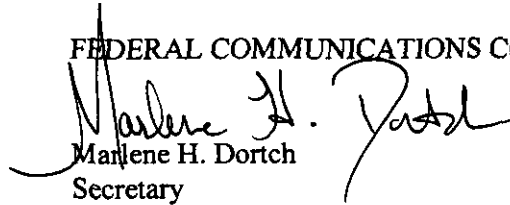
372. Accordingly, having reviewed the Application and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the application for consent to transfer control to The News Corporation Ltd., News Publishing Australia Limited, and Fox Entertainment Group, Inc., various Commission authorizations as set forth in Appendix G, including DBS and fixed satellite space station authorizations, earth station authorizations, and other related authorizations, held by wholly- or majority-owned subsidiaries of General Motors Corporation and Hughes Electronics Corporation IS GRANTED subject to the conditions stated below.

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<sup>967</sup> See 47 U.S.C. §§ 309(a) and 310(d).

377. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE on December 19, 2003,<sup>968</sup> in accordance with Section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

  
Marlene H. Dortch  
Secretary

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<sup>968</sup> On December 19, 2003, the Commission released a public notice announcing the Commission's adoption of this Order. Public Notice, "Subject to Conditions, Commission Approves Transaction Between General Motors Corporation, Hughes Electronics Corporation and The News Corporation Limited," FCC 03-328 (rel. Dec. 19, 2003)

373. IT IS FURTHER ORDERED that as a condition of this grant The News Corporation Ltd., its wholly- and majority-owned subsidiaries, and Hughes Electronics Corporation shall comply with the conditions set forth in Appendix F of this Order.

374. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309 and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 309, 310(b) and (d), that the Petition to Adopt Conditions to Authorization and Licenses filed by the U.S. Department of Justice and Federal Bureau of Investigation, on November 25, 2003, IS GRANTED, and that the authorizations and licenses related thereto which are to be assigned or transferred as a result of this Order are subject to compliance with provisions of the Agreement between General Motors Corporation, Hughes Electronics Corporation, and The News Corporation Limited on the one hand, and the U.S. Department of Justice and the Federal Bureau of Investigation on the other, as further set forth in Paragraph 38 and Appendix E of this Order, which Agreement is designed to address the national security, law enforcement, and public safety concerns of the U.S. Department of Justice and the Federal Bureau of Investigation regarding the authority granted herein, is fully binding upon General Motors Corporation, Hughes Electronics Corporation, and The News Corporation Limited and those subsidiaries, successors and assigns of both companies that provide telecommunications services within the United States. Nothing in the Agreement is intended to limit any obligation imposed by Federal law or regulation.

375. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petitions to Deny filed by EchoStar Corporation, Center for Digital Democracy, and National Hispanic Media Coalition and all similar petitions ARE DENIED.

376. IT IS FURTHER ORDERED that the Petition to Condition the Transfer of Control filed by Wyser-Pratte Management Co., Inc., and the Petition to Designate the Application for Hearing filed by National Rural Telecommunications Cooperative ARE DENIED.

programming providers and for ensuring non-discriminatory access to national and non-sports regional programming for rival MVPDs. Consequently, we impose no additional remedial actions with respect to these video programming products beyond those offered by the Applicants.

366. In contrast, based on our review of the record, we find substantial evidence that competitive and consumer harms would likely result from the increase in News Corp.'s ability to leverage its market power with respect to both regional sports networks and local broadcast television once it acquires control of DirecTV. The record indicates that temporary withdrawal of regional sports programming networks and local broadcast television station signals during disputed carriage negotiations will cause a significant number of customers to shift from their current MVPD, which is subject to the foreclosure, to DirecTV. In addition, there is significant evidence in the record that the per-subscriber profits generated by each additional DirecTV subscriber are sufficiently large that the increased downstream revenues resulting from temporary foreclosure are likely to exceed the costs of foreclosure in many local markets. Accordingly, we find that, as a result of the transaction, the increased profits accruing to DirecTV and News Corp. as a result of the temporary withdrawal of regional sports programming and broadcast signals will give News Corp. an increased incentive to adopt a strategy of temporary foreclosure in order to uniformly raise the price of its broadcast television and regional sports programming and/or obtain other carriage concessions. News Corp.'s post-transaction ability to act anti-competitively to increase its competitors' programming costs is greater than it would otherwise be due to News Corp.'s post-transaction ability to off-set temporary revenue losses arising from foreclosure with increased profits accruing to DirecTV as subscribers drop the affected MVPD and subscribe to News Corp.'s affiliated MVPD. This increased ability and incentive to seek and obtain higher programming prices and/or obtain other carriage concessions through temporary foreclosure would likely lead to higher prices to MVPD consumers and thereby harm the public interest. To avoid public interest harms that would result from such conduct, we impose several conditions to maintain the balance of bargaining power between News Corp. and other MVPDs at roughly pre-transaction levels.

367. In addition, we have found that the increase in News Corp.'s market power with respect to its RSN and local broadcast station programming would likely, if not checked, permit News Corp. to inflict additional collateral damage on rival MVPDs. For example, the incremental increase in News Corp.'s market power resulting from its acquisition of control of DirecTV could be used to force MVPDs to carry or use technologies such as its electronic and interactive programming guides as conditions of accessing its "must have" programming. We also found that this same potential for increased use of temporary foreclosure would reduce program diversity on a short term basis because consumers lack access to the foreclosed programming and that, in the long run, the increased costs paid by MVPDs to News Corp. would also likely reduce program diversity because absent these increased costs, the MVPD might have elected to carry a new niche network that would have expanded the types of programming available to its subscribers. We made similar findings with respect to the impact of the transaction on viewpoint diversity.

368. To mitigate the increased market power the transaction provides to News Corp. with respect to carriage negotiations for RSN and local broadcast station signals, we impose the additional conditions described above and set forth in Appendix F below. With respect to local television broadcast stations on whose behalf News Corp. negotiates retransmission consent, we extend the good faith and exclusivity requirements of SHVIA beyond their scheduled sunset date to run concurrently with the program access rules applicable to satellite cable programming. In addition, we extend News Corp.'s proposed non-discrimination safeguards to its broadcast programming, so that News Corp. must make its programming subject to retransmission consent available to all MVPDs on a non-discriminatory basis. To deter the more frequent use of temporary foreclosure strategies following News Corp.'s acquisition of control of DirecTV, the principal harm associated with vertical integration identified in the record, we

programming is not diverse, or that its EEO policies need improvement. Thus, we cannot find that these claimed diversity benefits are transaction specific.

## IX. BALANCING POTENTIAL PUBLIC INTEREST HARMS AND BENEFITS

358. Our task under the Communications Act is to determine whether the “public interest, convenience and necessity will be served” by the granting of the Application.<sup>957</sup> The public interest standard involves a balancing of potential public interest harms of the proposed transaction and the potential public interest benefits.<sup>958</sup> The Applicants bear the burden of proving, by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.<sup>959</sup> Our options at this stage are to approve the application without conditions, approve it with conditions, or hold a hearing if we are unable to make the findings required for approval.<sup>960</sup> The Application and the substantial record before us make clear that, on balance, the public interest will be served by approval of the application as amended by the conditions that we impose herein.

359. The proposed transaction would combine News Corp., a major supplier of, *inter alia*, video programming, including one of four national broadcast networks, 35 owned and operated local broadcast television stations as well as various cable programming program networks, with Direct TV, the second largest MVPD and one of the two incumbent nationwide DBS providers. Integration of programming with distribution is not new in the media industry. Broadcasters, cable operators and DBS providers are all permitted to own programming assets, although the terms and conditions of the sale of vertically integrated satellite cable programming to rival distribution networks is subject to certain rules to ensure that vertical integration does not cause anticompetitive outcomes.<sup>961</sup>

360. The potential harms of the combination of News Corp. and Hughes’ assets are in many respects those inherent in such supplier/distributor integration, and in balancing the potential public interest harms and benefits, we take into account how such potential harms have been dealt with in related contexts. On the one hand, certain of the potential competitive harms inherent in vertically integrated programming/MVPD providers have been recognized as requiring special remedies to prevent potential abuses. On the other hand, the remedies chosen, at least in recent years, have not generally been structural remedies, such as prohibitions on common ownership of programming and distribution assets, but behavioral remedies, such as requirements for program access and nondiscrimination.<sup>962</sup> This choice reflects the general recognition that vertical integration is less likely than horizontal integration to

<sup>957</sup> See 47 U.S.C. §§ 310(d), 309(a)&(d).

<sup>958</sup> See, e.g., *AT&T-Comcast Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DirecTV Order*, 17 FCC Rcd at 205784 ¶ 25

<sup>959</sup> See *id.*

<sup>960</sup> If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, Section 309(e) of the Act requires that we designate the application for hearing. 47 U.S.C. §309(e).

<sup>961</sup> See, e.g., Section 628 of the Communications Act of 1934, as amended, 47 U.S.C. § 548.

<sup>962</sup> See, e.g., 47 C.F.R. § 76.100, *et seq.*; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution. Section 628(c)(5) of the Communications Act*, 17 FCC Rcd 12124 (2002).

## 8. Increased Program and Employment Diversity

352. *Positions of the Parties.* Applicants contend that the transaction will benefit the public by increasing programming geared to linguistic, ethnic, and cultural minorities, and by promoting employment diversity.<sup>940</sup> These claims are summarized and discussed below.

353. Applicants assert that the proposed transaction would increase program diversity because the transaction will bring News Corp.'s "deep commitment" to diversity to Hughes, resulting in DirecTV's carriage of more programming targeted at culturally, ethnically, and linguistically diverse audiences.<sup>941</sup> In support of this claim, News Corp. cites several examples of its commitment to diversity in programming, including television programming and films with prominent minority cast members and minority directors.<sup>942</sup> Applicants assert that the nationwide reach of DBS service will allow News Corp. to efficiently aggregate and reach niche audiences. In response to these claims, as with other diversity benefits claimed by Applicants, commenters contend that Applicants have failed to show that there is anything lacking in DirecTV's commitment to diverse programming.<sup>943</sup> Moreover, several commenters contend that the transaction poses potential harms to program diversity.<sup>944</sup>

354. The Commission has traditionally sought to increase employment of women and minorities by broadcasters and MVPDs through its equal employment opportunity ("EEO") rules and policies.<sup>945</sup> The Commission's rules prohibit discrimination in hiring and employment. In addition, FCC EEO outreach rules require broadcasters and MVPDs to: provide wide dissemination of job vacancies; undertake initiatives such as jobs fairs and internships to assist jobseekers develop skills and training; and evaluate regularly the efficacy of these efforts.<sup>946</sup>

355. Applicants contend that the proposed transaction will serve the public interest by promoting employment diversity.<sup>947</sup> Applicants submit that News Corp. is a leader in promoting employment diversity, and that its commitment to such diversity will be expanded to DirecTV as a result

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<sup>940</sup> Application at 39-43.

<sup>941</sup> Application at 42.

<sup>942</sup> *Id.*; Applicants' Sept. 11 Ex Parte at 3-4.

<sup>943</sup> ACA Comments at 28; JCC Comments at 72.

<sup>944</sup> ACA Comments at 3, 7, 16, 29; Cablevision Comments at 23-29; CDD Petition at 2-3; CFA Reply Comments at 9-12; EchoStar Petition at 39-40; NRTC Petition at 9-16. Commenters' concerns about potential harms to program diversity are discussed at section VII.A.2 above. There, we conclude that the transaction is unlikely to reduce program diversity.

<sup>945</sup> See 47 CFR §73.2080 (Broadcast EEO Rule); 47 CFR §76.75 (Cable EEO Rule).

<sup>946</sup> In 2000, the Commission adopted EEO rules subsequently invalidated by the US Court of Appeals for the District of Columbia Circuit. *MD/DC/DE Broadcasters Association v FCC*, 236 F.3d 13 (D.C. Cir. 2001), rehearing denied 253 F.3d 732 (D.C. Cir. 2001), cert denied, 122 S.Ct. 920 (2002). The Commission adopted its current broadcast and MVPD EEO rules pursuant to a further rulemaking proceeding. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd 24018 (2002) ("EEO Second Report and Order")

<sup>947</sup> Application at 39-43.

343. Similarly, if the merged entity can secure larger volume discounts from suppliers, and then pass those lower costs through to consumers in the form of lower end-user prices, this likewise would constitute a public interest benefit that should be considered in balancing the potential harms and benefits of the proposed transaction. If, on the other hand, the volume discounts take the form of savings in fixed costs, and those savings are not passed on to consumers, then we would be less inclined to treat such savings as a public interest benefit.

344. Based on the evidence presented by Applicants, we believe that the transaction is likely to enable the merged entity to achieve certain economies of scale and scope, particularly in R&D, that absent the transaction the parties individually could not have achieved. At the same time, it is not clear that all \$60 million estimated by Applicants would qualify as a cognizable public interest benefits, either because the savings are not transaction specific (such as when innovations are produced by third parties and sold generally) or because it is not clear that the savings will be flowed through to consumers. Thus, while we believe that the proposed transaction will yield certain transaction-specific, cognizable benefits resulting from economies of scale and scope, we do not accept the total savings estimated by Applicants. Accordingly, while we accept these benefits in theory, we do not give significant weight to them in our balancing of potential public interest harms and benefits.

## 5. Improved Customer Satisfaction and Reduced Churn

345. Applicants claim that, because the post-transaction entity will offer more and better quality DBS products, customer satisfaction will increase. This in turn should enable DirecTV to increase its subscriber base and reduce churn and generally make it more competitive vis-à-vis other MVPD providers.<sup>932</sup> Applicants also contend that the proposed transaction, by bringing together the conditional access technology owned by News Corp.'s NDS subsidiary, and DirecTV's conditional access technology, will enable the merged entity to reduce signal piracy.<sup>933</sup> Based on Applicants' estimates of incremental new subscribers and its estimates of savings resulting from reduced churn, Applicants project an annual increase in earnings of \$450 million to \$525 million by 2006.<sup>934</sup> Applicants assert that these revenues will be used for additional initiatives that will produce better products and services.

346 JCC counter that the claim of efficiencies related to increased customer satisfaction is simply a restatement of the claim that News Corp. will bring innovative offerings to DirecTV, and that this claim is too vague to be recognized.<sup>935</sup> EchoStar argues that this claim rests on the earlier assumptions of increased local-into-local, HDTV, interactive services and DVRs, and that Applicants have not shown those claims to be transaction-specific. Noting that the claim relating to reduced churn is based in part on BSkyB's low churn rate, EchoStar further argues that that News Corp. faces different MVPD competitors in the U.K., and it points out that News Corp. has not specified how they will reduce churn for DirecTV.<sup>936</sup>

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<sup>932</sup> Application at 36

<sup>933</sup> *Id.* at 37

<sup>934</sup> *Id.* at 36-37.

<sup>935</sup> JCC Comments at 70-71.

<sup>936</sup> EchoStar Petition at 44-45

practices. For example, Applicants claim that, with the proposed transaction, DirecTV might reduce its costs by scaling back its reliance on third-party customer service centers, and performing that function in-house. Applicants estimate annual savings of \$40-\$80 million annually by instituting this change. Applicants claim that half those savings would be transaction specific, but provide no evidence that the incentive or ability to increase the use of in-house service centers is unique to News Corp. or that specific synergies exist by which News Corp. could operate in-house customer service facilities more efficiently than an outside contractor, or than could DirecTV itself if it provided customer service solely on an in-house basis. In fact, DirecTV currently has ten customer service centers, one of which is operated in-house.

338. Applicants also estimate annual savings of \$7-15 million by rationalizing operational areas, including the sharing of national distribution facilities operated by Fox Cable Networks and by DirecTV.<sup>917</sup> We note, however, that News Corp. will have only a partial interest in DirecTV, and this may affect the feasibility of realizing benefits related to rationalizing operational areas.<sup>918</sup> In particular, the Applicants have not demonstrated that, with a 34% interest in DirecTV, News Corp. could realize benefits above that which DirecTV could already realized through contractual agreement with News Corp. or some other entity.<sup>919</sup> Thus, we exclude these savings from estimated benefits of this transaction.

#### 4. Economies of Scope and Scale

339. Applicants claim that the proposed transaction, by more than doubling the post-transaction entity's subscriber base (from 11.4 million for DirecTV alone to over 23 million subscribers for News Corp./DirecTV worldwide), will allow the merged entity to take advantage of economies of scale and scope. For example, Applicants claim that, by spreading the costs of research and development ("R&D") over all News Corp.'s satellite operations and by pursuing common technology standards for both hardware and software, will be able to develop and introduce innovations more economically.<sup>920</sup> Applicants further claim that the transaction will permit the merged entity to explore more efficiently next-generation technologies, such as improved video and audio compression, improved spectrum efficiency using 8PSK and other advanced modulation techniques and Turbo coding.<sup>921</sup> Finally,

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<sup>917</sup> It appears that these claimed savings were not included in the estimate of the total savings that would result from the merger. See Application, Giacalone Decl. ¶ 7.

<sup>918</sup> In this regard, we note that the Applicants attempt to rebut claims that News Corp. and DirecTV will engage in temporary foreclosure on the ground that News Corp. will possess only a minority interest in DirecTV and that consequently joint profit maximization is not feasible. The logic of this argument also suggests that News Corp.'s minority interest should also limit the ability of the Applicants to jointly achieve operating efficiencies.

<sup>919</sup> We use the 34% ownership stake in evaluating this claimed benefit because this is the ownership stake that News Corp. will possess immediately after consummation of the transaction, and there is no certainty that News Corp. will increase that stake. In analyzing potential harms, however, we use higher ownership stakes because News Corp. may increase its ownership interest without further Commission review, and this may affect its incentive to engage in temporary foreclosure.

<sup>920</sup> Application at 34.

<sup>921</sup> Application at 34.

contends that these claims are not transaction-specific, and that DirecTV, absent the transaction, has access to all the means cited by Applicants for providing local-into-local in additional markets. EchoStar also states that DirecTV has already announced that, without the merger, it will offer additional HDTV, for a total of seven HDTV channels. Finally, EchoStar asserts that, to the extent that News Corp. enters into partnering arrangements with existing broadband providers, this will not create new broadband options.<sup>906</sup>

331. Responding to critics' questioning of the claim that the merger will result in an increase in the number of DMAs receiving local broadcast television signals via satellite, Applicants point to News Corp's expertise and commitment to local services, and the economies of scale and scope and improved access to capital that will result from the transaction. And they contend that these factors provide sufficient evidence that such an expansion will occur. With respect to NRTC and EchoStar's argument concerning expanded broadband deployment, Applicants acknowledge that Hughes already provides broadband and could engage in various partnering solutions, but maintain that, as a result of the proposed transaction, DirecTV will be able to increase these offerings, due to its improved capital structure.<sup>907</sup>

332. Applicants subsequently committed to a schedule for providing a greater number of local channels and/or HDTV channels than DirecTV previously announced. Specifically, they committed to provide by end of 2004, either local channels in 30 additional DMAs, or 30 more national HDTV channels, or some combination of additional local-into-local DMAs and HDTV channels, based on the bandwidth requirements.<sup>908</sup> In addition, Applicants claim that, in the longer term, they will design and launch a new generation of satellites as early as 2006 and no later than 2008 that will provide much greater capacity for DirecTV services. This effort, which involves a financial commitment above that which Hughes's current owner has authorized, will enable DirecTV to provide local broadcast channels in all 210 DMAs, including local channels in HDTV format in select markets.<sup>909</sup> Applicants stated that, "as early as 2006 and no later than 2008, (1) DirecTV will offer a seamless, integrated local channel package in all 210 DMAs, and (2) DirecTV will offer at least 200 to 300 channels of local and national HDTV programming." Applicants claim that DirecTV will be the strongest possible competitor to cable *only if* it can provide consumers with their local broadcast channels and with HDTV programming and that they intend to extend that capability as quickly and efficiently as possible.<sup>910</sup>

333. *Discussion.* The Commission has long recognized the importance of local broadcast television and its contribution to the Commission's goal of fostering localism in media. To the extent that the transaction results in an increase in the amount of DBS-provided local-into-local service and/or the number of HDTV channels offered to subscribers, this should increase competition in MVPD markets and should benefit consumers through increased choice, lower prices, or both. In addition, we find that

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<sup>906</sup> EchoStar Petition at 40-43.

<sup>907</sup> Applicants' Reply at n. 224; Applicants' July 28 Response at 35.

<sup>908</sup> See Letter from William M. Wiltshire, Counsel for The News Corporation, *et al.*, to Marlene H. Dortch, Secretary, FCC, (September 22, 2003) ("Applicants' Sept. 22 Ex Parte") at 3.

<sup>909</sup> *Id.* at 2, 4.

<sup>910</sup> *Id.* at 4.

interactive TV news in June 2000, BSkyB's subscribership increased by 12 percent.<sup>889</sup> News Corp. has also aggressively introduced new programming and programming services in its Sky Italia and STAR operations. For example, Sky Italia launched a new 24-hour news channel in August 2003.<sup>890</sup> Similarly, in Asia, STAR expanded its offering of services, ranging from radio to television to interactive digital cable TV,<sup>891</sup> and including the introduction of Xing Kong Wei Shi, the first all-new channel granted cable carriage in mainland China.<sup>892</sup>

326. News Corp. has pursued a similar strategy of innovation and aggressive competition in the United States and in many cases has successfully challenged incumbent broadcast and cable programming networks. For example, in the mid-1980s, News Corp. purchased six television stations and then challenged the long-standing dominance of the then big-three broadcast television networks by launching a fourth broadcast network, despite widespread skepticism that no such network could survive.<sup>893</sup> Over the years, News Corp. acquired additional independent broadcast television stations and entered into affiliation agreements with more, and News Corp. helped the local stations build market share by, among other things, introducing prime-time local news broadcasts (the 10:00 p.m. time slot), by introducing new and popular programming on the Fox network (such as *The Tracey Ullman Show*, *Married . . . With Children*, *The Simpsons*, *America's Most Wanted*, *The X-Files*, and *24*) and by outbidding CBS for the right to broadcast National Football Conference games.<sup>894</sup> News Corp. has been similarly aggressive in introducing new cable networks. For example, its launch of Fox News Channel brought a new perspective on cable news and brought heightened competition to a market that previously had been dominated by CNN.<sup>895</sup> Similarly, News Corp., by accumulating stakes in a number of regional networks and by aggressively bidding for broadcast rights, built Fox Sports Net into the largest RSN that now challenges ESPN.<sup>896</sup> Finally, News Corp. has introduced new and innovative programming on its various overseas DTH platforms.<sup>897</sup>

327. Given News Corp.'s history of taking significant risks and introducing new and innovative media services, including in particular DTH services, we find credible the Applicants' claim that they will accelerate the introduction of new DTH services, including interactive services. Moreover, it has been reported that cable MSOs, in anticipation of the consummation of this proposed transaction,

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<sup>889</sup> *Id.*

<sup>890</sup> *Id.*, Gagliardi Aff. at 2.

<sup>891</sup> News Corp. 2003 Annual Report at 17.

<sup>892</sup> News Corp. 2002 Annual Report at 21.

<sup>893</sup> See, e.g., WALL ST. J. May 17, 1985; WASHINGTON POST, May 19, 1985; BUSINESS WEEK, May 20, 1985; Application at 24.

<sup>894</sup> See, e.g., WALL ST. J., May 27, 1987; LOS ANGELES DAILY NEWS, Jan. 1, 1990; WALL ST. J. Dec. 20, 1993; PORTLAND OREGONIAN, May 15, 1994; ST. LOUIS DISPATCH, October 31, 1996; Application at 24.

<sup>895</sup> See, e.g., ROCKY MOUNTAIN NEWS, Mar. 3, 1996; Application at ii-iii, 23-24; Applicants' Reply at 78.

<sup>896</sup> FORTUNE, Oct. 26, 1998, at 92 *et seq.*; Fox Entertainment Group, Form 10-K (for the year ending Jun. 30, 2000); Application at 26.

<sup>897</sup> News Corp. 2003 Annual Report at 17 & 21; Application, Gagliardi Decl. ¶ 12; Applicants' Sept. 22, 2003 *ex parte* at 10.

321. *Interactive Television* News Corp. claims that it will use its experience from launching interactive television ("ITV") services in the U.K. through BSkyB to "enhance the ITV capabilities available to DirecTV subscribers and to create a greater level of awareness among consumers."<sup>874</sup> According to Applicants, BSkyB's SkyActive service offers interactive news and delivers "online shopping, banking, games, e-mail, travel, tourism, and information services with all the look, feel, and immediacy that customers expect from television."<sup>875</sup> Subscribers can "choose from multiple segments being broadcast simultaneously on a news channel," "view multiple screens of programming within a certain genre and click on the one that interests them, and can choose from among multiple camera angles during the broadcast of sporting events."<sup>876</sup> Applicants contend that an ITV offering will make DirecTV a better competitor in the MVPD market.<sup>877</sup>

322. Applicants have additionally stated that, as a first step toward introducing "robust interactive services," the merged entity would release a new user interface in 2004 that will be incorporated in all new set-top-boxes and will be downloaded to as many as 10 million legacy set-top-boxes that are already operating in subscribers' homes.<sup>878</sup> Applicants further state that, by the end of 2004, the parties will incorporate new middleware into subscriber set-top-boxes that will enable DirecTV to introduce new interactive services, including interactive news, weather, traffic, and games.<sup>879</sup>

323. Several parties opposing the transaction contend that allowing News Corp. to apply its experience and assets relating to ITV services to DirecTV will result in public interest harms, rather than a benefit.<sup>880</sup> These arguments are addressed in section VI.C.4.d, *supra*.

324. *Integrated Set-top Boxes.* Applicants also claim that the proposed transaction will increase the penetration of digital video recorders ("DVRs") contained in integrated set-top boxes. According to Applicants, the merged entity, by "drawing on the marketing expertise within FEG, BSkyB

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point to: (1) News Corp.'s introduction of the Fox Network in 1986; (2) its launch of Fox News Channel in 1996; (3) its innovations in the news and informational programming offered by Fox Television Stations; and (4) its founding of Fox Sports Net in 1997. Application at 21-27.

<sup>874</sup> Application at 22; Giacalone Decl. ¶¶ 19-20.

<sup>875</sup> *Id.*; see also News Corp. July 28 Response at 41

<sup>876</sup> *Id.*

<sup>877</sup> Application at 23; see also News Corp. Sept. 10 Ex Parte at 2 and Attachment 2.

<sup>878</sup> Applicants' Sept. 22 Ex Parte at 4.

<sup>879</sup> Applicants' Sept. 22 Ex Parte at 4 To facilitate implementation of its ITV plans, News Corp. entered into two agreements with Thomson on September 13, 2003 Under the first agreement, News Corp. purchased the *MEDIAHIGHWAY* middleware business from Thomson. The Applicants claim the *MEDIAHIGHWAY* product line will enable set-top-boxes to better interpret and execute interactive applications. Under the terms of the second agreement, News Corp. and Thomson will enter into a non-exclusive preferred supplier relationship, which the Applicants claim will enable News Corp. to capture economies of scale and scope. *Id.* at 5-6.

<sup>880</sup> See CDD Petition at 4, NAB Comments at 20. For example, NAB argues generally that beyond simple blatant denials of access to DirecTV, the post-transaction entity could discriminate against content owners in such technology-related areas as interactivity, channel assignment and positioning, use of navigation devices and electronic program guides, data transfer speed and downstream and upstream return path traffic. *Id.*

that consumers will benefit, and our goals of promoting localism and competition will be furthered, to the extent that the transaction increases the number of DMAs that receive local-into-local broadcast television channels. To ensure that this benefit is realized, we impose a condition described below that is intended to ensure that News Corp. will adhere to its promised build-out plans. Third, we find that the proposed transaction is likely to yield some benefits in the form of increased economies of scale and scope, improved customer satisfaction and reduced churn, and a reduction in double marginalization. We assign little weight to those claimed benefits, however, for the reasons given below. Finally, as discussed below, we do not recognize as potential public interest benefits the Applicants' claims that the proposed transaction will result in increased operating efficiencies, improved access to capital, or expanded program and employment diversity and equal opportunity.

#### A. Analytical Framework

316. The Commission has recognized that "[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products."<sup>864</sup> Under Commission precedent, however, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transfer outweigh the potential public interest harms.<sup>865</sup>

317. There are several criteria the Commission applies in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be *transaction- or merger-specific*. This means that the claimed benefit "must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects."<sup>866</sup> Second, the claimed benefit must be *verifiable*. Because much of the information relating to the potential benefits of a merger is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each benefit claim so that the Commission can verify the likelihood and magnitude of the claimed benefit.<sup>867</sup> In addition, as the Commission has noted, "the magnitude of

<sup>864</sup> See *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20630, ¶ 188; Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control, 12 FCC Rcd 19885, 20063 ¶ 158 (1997) ("*Bell Atlantic-NYNEX Order*"); see also *DOJ/FTC Guidelines* § 4.

<sup>865</sup> See, e.g., *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20630, ¶ 188; see also *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157, Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer of Control, 14 FCC Rcd 14712, 14825 ¶ 256 (1999) ("*SBC-Ameritech Order*").

<sup>866</sup> *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20630 ¶ 189; see also *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 158 ("Pro-competitive efficiencies include only those efficiencies that are merger-specific, i.e., that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger."); *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255 ("Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger. . ."); *Comcast-AT&T Order*, 17 FCC Rcd 23246, 23313 ¶ 173 (Commission considers whether benefits are "merger-specific"). Cf. *DOJ/FTC Guidelines* § 4.

<sup>867</sup> *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20630 ¶ 190; see also, *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157 ("These pro-competitive benefits include any efficiencies arising from the transaction if such efficiencies . . . are sufficiently likely and verifiable . . ."); *Comcast-AT&T Order*, 17 FCC Rcd at 23313 ¶ 173 (Commission considers whether benefits are "verifiable"); *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255, *DOJ/FTC Guidelines* § 4 ("[T]he merging firms must substantiate efficiency claims so that the Agency can verify (continued . . .)

has not provided the public with final media ownership rules allegedly needed to determine the relevant factual showings and/or legal standards for reviewing the proposed transaction. Initially, NHMC argued that the Commission had not released final rules at the time initial comments were due on the proposed transaction application.<sup>848</sup> Subsequently, NHMC contended in its reply comments that the Commission had only recently released an erratum to the *Media Ownership Order* and had not published final rules in the Federal Register as of the deadline for reply comments.<sup>849</sup> As a result, NHMC argues that, if the Commission were to issue a decision on the proposed transaction during this time of legal limbo where the Commission lacks final multiple ownership and cross-interest rules, the decision would violate the fair notice and opportunity for comment provisions of the Administrative Procedure Act.<sup>850</sup> If the Commission does not deny the proposed transaction application for these reasons, NHMC argues that the Commission must release a new public notice allowing interested parties to file comment on the proposed transaction within 30 days upon release of final media ownership rules.<sup>851</sup>

311. The Applicants argue that NHMC's request is groundless and largely moot and therefore should be rejected.<sup>852</sup> The Applicants note that the new media ownership rules were released with the Commission's *Media Ownership Order* on July 2, 2003.<sup>853</sup> Further, the Applicants contend that the new media ownership rules are irrelevant to their license transfer Application because the Application does not involve any broadcast licenses of the type that are at issue in the *Media Ownership Order* and thereby subject to the broadcast license transfer processing freeze.<sup>854</sup>

312. *Discussion.* Since the filing of NHMC's reply comments, the Commission has released its final media ownership rules.<sup>855</sup> Those rules, however, were stayed by the United States Court of Appeals for the Third Circuit.<sup>856</sup> As a result, the previous media ownership rules have been reinstated. Thus, all commenters have had, and continue to have, available what are now the current media ownership rules at the deadlines for initial and reply comments on the proposed transaction. Moreover, because this is a permit-but-disclose proceeding, interested parties, including NHMC, were able to file comments addressing the impact of the current media ownership rules on the proposed transaction in the form of oral or written ex parte presentations throughout this up proceeding. Finally, these rules are part of the Commission's continuing biennial review process and therefore will be subject to change at least every two years. For these reasons, we do not find NHMC's arguments compelling and will not release a subsequent public notice seeking comment as requested.

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<sup>848</sup> NHMC Petition at 2-4.

<sup>849</sup> NHMC Reply at 2.

<sup>850</sup> NHMC Petition at 5.

<sup>851</sup> NHMC Reply at 3.

<sup>852</sup> Applicants' Aug. 28 *Ex Parte*.

<sup>853</sup> See 2002 Biennial Review Order.

<sup>854</sup> Applicants' Aug. 28 *Ex Parte*.

<sup>855</sup> See 2002 Biennial Review Order.

<sup>856</sup> See *Prometheus Radio Project v. FCC*, No. 03-3388, rel. Sept. 3, 2003 (3rd Cir. 2003).